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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968 No. 575

STATE OF WISCONSIN,

Respondent,

v.

MICHAEL D. PRESTON,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

Attorney Kenneth J. Ehlenbach, on behalf of the petitioner, Michael D. Preston petitions for a writ of certiorari to review the judgment of the Supreme Court of Wisconsin in the above entitled case.

OPINIONS BELOW

The judgment of the Supreme Court is officially reported in 38 Wis. (2d) 582 and unofficially in 157 N. W. (2d) 615.

JURISDICTION

The judgment of the Supreme Court of Wisconsin (App. 9) was entered on April 9, 1968, and the decision on the motion for rehearing was filed on June 28, 1968. The jurisdiction of this Court is involved under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the due process and equal protection, Article XIV, Sec. 1 of the United States Constitution:

Article XIV, Sec. 1, U.S. Const.,

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

The Supreme Court of Wisconsin adopted, as their own findings based upon the preponderance of the evidence and ordered the revocation of the Petitioner's license to practice in the State of Wisconsin and imposed costs. The motion for rehearing was denied on its merits, however, the Court subsequently modified its opinion. The question presented is:

1. Whether the petitioner's privilege to practice law in the State of Wisconsin was revoked in violation of his right to due process -- and equal protection of the laws.

STATEMENT

An original action was commenced in the Supreme Court of Wisconsin upon the complaint of the Board of State Bar Commissioners seeking the discipline of the petitioner, Michael D. Preston. The Court appointed Elton J. Morrison, retired County Judge, as Referee, to hear the matter and report his findings.

The Referee filed his findings of fact which were based upon the preponderance of the evidence, as follows:

> "With reference to Count 1 of the Complaint . . . I find from the preponderance of the evidence . . ." (Referee's Report, page 110) (App. 17)
>
> "I am convinced from the preponderance of the reputable testimony . . ." (Referee's Report, page 123) (App. 17)
>
> "The preponderance of the evidence shows that . . .." (Referee's Report, page 123) (App. 17)

The Supreme Court of Wisconsin adopted the findings of the referee based upon the preponderance of the evidence. (App. 17)

The petitioner moved the Court for a rehearing and raised the issue of the inadequacy of the

quantum of proof by alleging that to support disciplinary action against the petitioner the findings must be supported by clear, satisfactory and convincing evidence, thus raising the constitutional question of due process and equal protection of the laws.

The Supreme Court of Wisconsin by denying the petitioner a hearing on the issues raised, and subsequently modifying its opinion and imposing additional costs, deprived the petitioner of due process and equal protection of the laws.

REASONS FOR GRANTING THE WRIT

The referee's findings based upon the preponderance of the evidence were adopted by the Supreme Court of Wisconsin. Such action deprived the petitioner of due process and equal protection of the laws.

A State may not exclude a person from practice of law or any other occupation in a manner or for reasons that contravene due process clause of this amendment. Schware v. Board of Bar Examiners of State of N. M., N. M. 1957, 77 S. Ct. 752, 353 U. S. 232, 1 L. Ed. 2d 796, 64 A. L. R. 2d 288.

Supreme Court of United States will review state court order disbarring attorney where attorney makes substantial allegation that disbarment proceedings violated disbarment process or equal protection clause of this amendment. Lenske v. Sercombe, D. C. Or. 1967, 266 F. Supp. 609.

In the matter of John Ruffalo, Jr., petitioner, ___U. S. ___, 20 L. Ed. 2d 117, 88 S. Ct. ___, decided April 8, 1968, it was pronounced that

disciplinary proceedings are of a quasi criminal nature, In re Gault, 387 U.S. 1, 87 S. Ct. 1428.

The State of Wisconsin has adopted the rule that the quantum of proof in a quasi criminal case is a so-called "middle standard of proof which was applicable to civil actions involving criminal actions and fraud" as requiring "clear, satisfactory and convincing evidence," Madison v. Geier, 27 Wis. 2d 687.

In the later case of Neenah v. Alsteen, 30 Wis. 2d, 596, the Court confirmed the Geier case and stated:

> "The burden of proof must be sustained by evidence that is 'clear, satisfactory and convincing,' rather than a 'mere preponderance.'"

The rule generally prevailing in this country was enumerated in In Re Ratner, 399 P. 2d 865, 869 (Kan., 1965):

> "The burden of proof required in a proceeding of this character is greater than that required in ordinary civil proceedings, this view prevails generally in this country (7 Am. Jur. 2d, Attorney at Law, Sec. 67, p. 89, 90, 105, ALR Anno--Attorney's Misconduct--Degree of Proof, 984 et seq.)"

Quoting In Re Smith, 85 P. 2d 584:

> "Although the proceeding is not criminal it is of such a nature and the judgment is so severe and so direful in its results to an attorney, that something more than a mere preponderance of proof is necessary." (E.S.)

Further, in support of the general rule that proof required in these proceedings must be more than the preponderance of the evidence, are the following:

"It is true that a higher degree of proof should be, and we believe is, required in a proceeding such as this, involving the right and privilege to continue to engage in the practice of the law, than is required to determine questions of fact in the ordinary civil case, or proceedings, and we are mindful of that difference in the degree of proof." (E. S.) John V. Copren v. State Bar of Nevada, 173 ALR 284, 183 P. 2d 833, 840 (Nev. 1947)

"The rules of evidence in regard to unprofessional conduct by attorneys must be clear and convincing before disciplinary proceedings will be taken." (E. S.) In the Matter of a Member of the State Bar of Arizona, Francis J. Brown, 416 (P2d) 975, 977 (Ariz. 1966)

"The findings to sustain disbarment must be sustained by a higher degree of proof than that required in civil actions, yet falling short of the proof required to sustain a conviction in a criminal case." (E. S.) State of Nebraska Ex Rel. Nebraska State Bar v. W. A. Nielsen, 136 NW 2d, 355, 360 (Neb. 1965)

"In making our determination we resolve all reasonable doubts in favor of the accused. If two or more equal inferences may be drawn from a proved fact the inference leading to a conclusion of innocence rather than one leading to a conclusion of guilt will be accepted." State Bar of California v. Zitny, 415, P. 2d 521, 523, (Cal. 1966)

"Charges of an attorney's unprofessional conduct should be sustained by convincing proof and to a reasonable certainty, and any reasonable doubt should be resolved in favor of the accused." (Brawner v. State Bar, 48 Cal. 2d 814 (1962).

In the initial judgment, the Supreme Court of Wisconsin assessed costs against the petitioner of a sum equal to one-half the costs not to exceed $5,000.00, in addition to the Order of revocation. In the petitioner's motion for reharing certain items of cost were challenged and although the Court denied the motion for rehearing, the challenged costs were eliminated, however, the fine was increased to $5,000.00.

The action of the Supreme Court of Wisconsin in revoking the petitioner's license based upon findings supported by the preponderance of the evidence and increasing the fine deprived the petitioner of due process and equal protection of the law, contrary to the United States Constitution.

The decision of the Supreme Court imposing such stringent restrictions on the defendant's right to gainful employment in the practice of the law is inconsistent with its own previous decisions and certainly inconsistent with the majority of decisions of other state courts and the United States Supreme Court.

CONCLUSION

This Court should grant certiorari to correct the manifest error of the Wisconsin Supreme Court in depriving the Petitioner of the right to practice in the State of Wisconsin, which decision was in violation of the Petitioner's constitutional rights.

Respectfully submitted,

KENNETH J. EHLENBACH

Attorney for the Petitioner

JUDGMENT OF SUPREME COURT
(Formal Parts Omitted)

ORIGINAL ACTION commenced in this court upon the complaint of the Board of State Bar Commissioners seeking the discipline of defendant, Michael D. Preston, an attorney. Adjudged defendant's conduct merits revocation of his license to practice law in this State and the imposition of certain costs.

The complaint of the Board of State Bar Commissioners alleged five counts of unprofessional conduct. Issue was joined upon the complaint. The Honorable E. J. Morrison was appointed referee to try the case and make findings and recommendations in conformity with provisions of sec. 256.28, Stats. Count III was dismissed on motion of the plaintiff. Trial was had on the remaining four counts, and the findings and recommendations of the referee have been made and filed.

The referee recommended that the license granted to the defendant to practice law in the State of Wisconsin be revoked. Counsel for the Board of State Bar Commissioners, upon the findings and recommendations of the referee, moves that such license be revoked. The defendant moves that the findings of the referee be set aside and that the action be dismissed.

PER CURIAM. Michael D. Preston is forty-nine years of age, a resident of Wauwatosa, Wisconsin, and has practiced law in Milwaukee since 1946. He was graduated from Marquette University Law School in 1943, and was admitted to practice law in Wisconsin in that year.

He is the father of three children, ages twenty-four, twenty and sixteen, and has three grandchildren.

He served in the United States Navy from 1943 through 1946, when he was honorably discharged.

The serious character of the alleged misconduct of the defendant can appropriately be described by reviewing each count and the findings of the referee thereon.

COUNT I

Between January 24, 1958, and April 1, 1959, the defendant purchased certain real estate in Milwaukee for the sum of $240,000, organized a corporation, and offered to sell the real estate to the corporation for the sum of $350,000 at a time when he was the sole stockholder of the corporation. The difference in the purchase price, i e., $110,000, was to consist of a mortgage and note from the corporation to defendant and his wife. The initial purchase of the real estate and its subsequent sale to the corporation produced several other financial and stock transactions between the defendant and the corporation. The gravity of the $110,000 mortgage transaction came into full focus when the corporation ultimately faced financial difficulties. See Frick v. Howard (1964), 23 Wis. 2d 86, 126 N.W. 2d 619. Defendant refuses to admit there was anything unprofessional in this conduct and asserts that the profit was justified because of his efforts prior to the sale and subsequent acts which resulted in a loss to him. He also contends that the mortgage was to provide a buffer or some measure of security in the event he became liable for any corporation indebtedness which he personally

guaranteed.

The referee found that the $110,000 profit by the defendant constituted a promoter's fraud upon the corporation.

COUNT II

This count arises out of a mortgage foreclosure proceeding against defendant's residence. During the course of the foreclosure proceedings, the defendant accepted service of various pleadings and processes on behalf of himself and his wife. Ultimately, his wife was actually served with the notice of sale at which time the defendant appeared specially on her behalf and objected to the manner in which prior processes and pleadings in the proceeding had been made upon his wife. The gravamen of the actions of the defendant lies in the fact that they ultimately produced an appeal to this court and delayed the orderly culmination of the mortgage foreclosure proceedings by approximately one year. See Howard v. Preston (1966), 30 Wis. 2d 663, 142 N.W 2d 178.

His attitude toward this situation is expressed by the following admission during the trial of this proceeding:

> " 'I had no intention to assist my bitter rivals in many cases that we had pending.' "

The referee found that the defendant, as an officer of the court, disregarded his duty to the court and that he took undue and unprofessional advantage of the plaintiff in the foreclosure action.

COUNT IV

The situation presented in this count evolves from a real estate transaction which took place in 1964.

The defendant represented a relative who was the seller. He negotiated and handled the sale of the real estate to a hospital. He represented to the seller that the sale price of the real estate was $55,000. In the closing of the transaction with the seller a spurious closing statement of unidentified origin was used which reflected the sale price to be $55,000.00.

The defendant represented to the hospital that the sale price of the real estate was $60,000, which was the amount the hospital actually paid. He further represented to the hospital that the sellers would not pay him a fee for his efforts in negotiating the sale. He indicated his fee would be $1,500 in addition to the sale price, and the hospital agreed to pay this fee. Eventually, upon learning the details of the transaction, the hospital declined to pay the $1,500 fee.

When the seller learned of the variance he became so concerned he engaged an attorney, contacted a hospital official and others. However, when he testified at the trial he attempted to show he was satisfied with the conduct of the defendant.

The referee found that the actions of the defendant constituted unprofessional conduct.

COUNT V

The background of this count is a divorce action. Loraine Hatch, a client of the defendant, was granted

a divorce in the Circuit Court for Waukesha County on September 30, 1963.

It primarily concerns overreaching, although other serious matters are involved.

The fees and disbursements charged by the defendant were approximately $11,000. They were paid by moneys received from his client, her husband, and a substantial portion of the property settlement his client was to receive in the amount of $7,500.

He represented to his client that the Trial Judge had told him his charges were satisfactory. At the trial of this matter, the Trial Judge denied having made such a statement and further testified that a reasonable fee would have been approximately $4,000. The fees of the attorney for the husband were $3,600.

The referee found that a check in the amount of $8,293.85 ($7,500 plus interest and fees) issued by the clerk of court to the wife was obtained by the defendant without the approval of the wife; that the check carried the alleged endorsement of the wife; that the endorsement was not that of the wife; and that the wife never authorized anyone to endorse it for her.

The defendant insisted the signature was genuine and produced a handwriting expert in an endeavor to prove its authenticity as against another handwriting expert produced by the plaintiff who testified that the signature was not that of the wife.

Further the defendant commingled the sum of $8,293.85 with his own funds without rendering an

accounting therefor.

As to County V, the referee found that the conduct of the defendant was unprofessional.

The hearing on this matter consumed nine days, the transcript of the testimony exceeds 1300 pages and over 100 exhibits were offered and received in evidence.

We have carefully considered the entire record. Clearly, on the basis of the evidence presented before the referee, his findings are not against the great weight and clear preponderance of the evidence, and we adopt the same. State v. Roggensack (1963), 19 Wis. 2d 38, 44; 119 N.W. 2d 412.

A substantial number of letters in support of the defendant's good character were presented to this court. A question of procedure arises in the presentation of these communications in that they were not before the referee at the time of his deliberations. However, in this particular case we have given them full consideration.

It is difficult to fully comprehend the hardship which the unprofessional conduct of the defendant has wrought upon a multitude of people during the last several years. It far transcends the difficulties that now confront the defendant and encompasses his family, other individuals including his clients, his fellow practitioners and the courts of this state. His activities presently under review are all predicated upon his professional standing. We deem it significant that at no time has the defendant evidenced any recognition of unprofessional conduct, but, on the contrary, he has consistently made a determined effort to justify his conduct.

Language seems weak indeed when we attempt to express an opinion as to conduct such as that engaged in by the defendant. Ever since the decision in the case of Ex Parte Wall (1882), 107 U.S. 265, 2 Sup. Ct. 569, courts have expressed the view that the revocation of a license of an attorney is not for the purpose of punishment but to protect the public and the courts from those who are unfit to be charged with the responsibilities of such office.

Any disposition of this case which might be construed as a condonation of the defendant's actions would be scarcely less culpable than the actions themselves.

The conclusion we reach, imperatively demands the revocation of the defendant's license.

The responsibilities of a lawyer are well stated by Mr. Justice Owen in In re Stolen (1927), 193 Wis. 602, 613, 214 N.W 379, 216 N.W. 127:

> "... One's morality or lack of morality is revealed by general conduct. One may lack morality in a great many ways. Where this lack of morality has no relation to, and does not affect, his duties and responsibilities as an attorney at law, the delinquencies are generally overlooked by the courts. But where there is lacking honesty, probity, integrity, and fidelity to trusts reposed in him, it matters not whether the lack of such virtues is revealed in transactions with clients, in the conduct of lawsuits, or any other business dealings or relations. These qualities are highly essential on the part of those who are to exercise the privileges and responsibilities of members of the

bar. When the lack of them becomes apparent, no matter what the character of the deal or transaction that may furnish the evidence, it becomes the duty of the court to purge its roster of an unreliable member. . . "

It is ordered and adjudged, that the license granted to Michael D. Preston to practice law in this state be and the same is hereby revoked and annulled for due cause and his name removed from the roll of attorneys of this court; that the State Bar of Wisconsin notify the courts of record of this state of this order by sending each a copy thereof; that the defendant pay one-half the costs and expenses of this proceeding, which shall include fees and disbursements of the referee, attorney for the plaintiff, court reporter and printing, but not to exceed a maximum of $5,000.

FINDINGS OF FACT

In General.

The defendant, Michael D. Preston, is 49 years of age, a resident of Wauwatosa, Wisconsin. He practices law in Milwaukee.

Defendant graduated from Marquette University Law School in 1943, and was admitted to practice in Wisconsin in that year.

He is the father of three children, ages 24, 20 and 16, and has three grandchildren. He served in the Navy from 1943 through 1946, when he was honorably discharged. He has practiced law in Milwaukee since 1946.

My impression of the defendant gained entirely

from my observation of him during the nine days consumed in the hearing of this case is that he is ambitious, sharp, capable, well grounded in the law. I gathered he is a lawyer who does not ask for, and receives no, favors from his fellow lawyers, particularly those who oppose him. He is shrewd, resourceful, and quick to take advantage of an opportunity to gain his point. His conduct in a case may win approval from his clients, if successful, but is apt, in my judgment, to create the impression on behalf of the opposition and the public that he is the "tricky" type of lawyer who bears watching at all times. Much of his conduct, as I shall detail later in these findings, do not reflect credit on the legal profession.

Count 1 of the Complaint.

With reference to Count 1 of the Complaint alleging that defendant purchased the Pan American Motel for $240,000 and later sold it to the motel for $350,000, thereby making a fraudulent profit of $110,000, I find from a preponderance of the evidence, that, ...

REASONS FOR RECOMMENDATION

I am convinced from the preponderance of the reputable testimony ...

The preponderance of the evidence shows that ...

MOTION FOR REHEARING

NOW COMES the above named defendant, and moves the Court for a rehearing in the above-entitled matter.

DECISION ON REHEARING
(Formal Parts Omitted)

PER CURIAM (on motion for rehearing). While we deny rehearing on the merits, the brief of the defendant raises several points that we deem merit clarification in that they are relevant generally to disbarment and disciplinary proceedings in this court.

The defendant's brief is premised upon the misconception that this court reviews the findings of the referee and applies an evidentiary test to determine whether the referee's findings are supported by the proper quantum of evidence. This is not correct.

A disciplinary proceeding is brought as an original action in this court, and the function of the referee is that of a special master appointed to conduct a hearing under the jurisdiction of this court. While the recommendations of the referee are given consideration, we look to the record and transcript to determine whether the facts apparent therein warrant some form of discipline. To evidence revealed in the record, we apply what this court has referred to (Madison v. Geier (1965), 27 Wis. 2d 687, 135 N. W. 2d 761) as the middle burden of proof.

As long ago as 1882 in In re Orton, 54 Wis. 379, 386, 11 N. W. 584, we stated that disciplinary action arising out of conduct related to a transgression of the criminal law "should be established by clear and satisfactory evidence, and cannot rest in doubtful and uncertain inferences."

The same rule was followed in In re O (1889), 73 Wis 602, 42 N. W. 221. The burden of proof

required was more recently set forth in State v. Treis (1944), 245 Wis. 479, 489, 15 N. W. 2d 309, wherein we said, "While this is a civil action, triable without a jury . . . Proof of the allegations must be by clear and satisfactory evidence."

While the language used by the referee in the instant case indicated that he relied upon a preponderance of the evidence in making his findings, each of his findings was scrutinized by this court on the basis of the evidence of record, and the conclusions of this court are those based upon proof of the allegations by clear, satisfactory, and convincing evidence. Any statement appearing in the body of the opinion giving the impression that a lesser burden of proof was required by this court in making its own determination is erroneous and is hereby modified.

The defendant on rehearing also complains that the referee, by concluding that the determination in Frick v. Howard (1964), 23 Wis. 2d 86, 126 N. W. 2d 619, was res judicata, deprived the defendant of his constitutional right of due process, since he was not a party to that case. However, the defendant overlooks his stipulation that the record in Frick v. Howard was available to the referee as evidence in the instant proceedings.

The defendant was given every opportunity to refute any of the inferences that might have arisen from the record in that case. The referee's statement also makes it clear that he did not rely on the judgment in Frick to make his finding. He stated that his conclusion was based on his own study of the factual and legal situation after nine days of hearing. He merely said that his own independent study resulted in conclusions that were not contrary

to those reached by this court in Frick v. Howard. Moreover, as stated above, this court in considering a disciplinary matter, looks to the evidence ab initio and makes its independent conclusions, which in this case resulted in findings identical with those made by the referee.

Nor do we find merit in the contention of the defendant that the charges against him should have been limited to those that come within the purview of Sec. 256.29 (2). While certain types of professional misconduct warranting disciplinary action are included therein, the statute does not limit the power of this court to inquire into other proper charges relative to the misconduct of a lawyer. The defendant's contention was disposed of in State v. Roggensack (1963), 19 Wis. 2d 38, 119 N.W. 2d 412; State v. Horan (1963), 21 Wis. 2d 66, 123 N.W. 2d 488; State v. Cannon (1928), 196 Wis. 534, 221 N.W. 603.

The defendant also urges that this court is authorized to impose costs only if the proceeding results in a temporary suspension of license under Sec. 256.28 (13)(b), Stats. He correctly states that Sec. 256.28 (13)(a), referring to the absolute revocation of a license, is silent on the question of costs. We consider, however, that the section specifically relating to costs and fees, Sec. 256.28 (14), authorizes that, "The Supreme Court shall tax the costs including the witnesses', reporter's, clerk's, sheriff's, referee's and other officers' fees." In addition, Sec. 256.28 (15) provides:

> "The reasonable costs of disbarment proceedings conducted under the usual practice, other than that specially provided for in this section, shall be taxed, paid, adjudged and

collected in the same manner as herein prescribed."

We are satisfied that these two subsections are ample authority for the taxation of costs against the defendant. These subsections, however, do not authorize the taxing of the attorney's fees. The mandate herein is modified to eliminate therefrom the phrase, "attorney for the plaintiff." Inasmuch as this court previously determined that a proper assessment of the costs against the defendant would be the sum of $5,000, and the costs exclusive of attorney's fees are substantially in excess of that figure, we reaffirm that portion of the mandate assessing costs in the sum of $5,000.

The rehearing is denied.

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No. 575

STATE OF WISCONSIN,

Respondent,

vs.

MICHAEL D. PRESTON,

Petitioner.

BRIEF OF RESPONDENT IN OPPSITION TO PETITION FOR WRIT OF CERTORARI

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NO. 575

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BRIEF OF RESPONDENT IN OPPSITION TO PETITION FOR WRIT OF CERTORARI

The State of Wisconsin, Respondent, by its attorneys Rudolph P. Regez, Counsel for the Board of State Bar Commissioners, and Warren H. Resh, Special Counsel for the State Bar of Wisconsin present this brief in opposition to the Petition for a Writ of Certiorari to the Supreme Court of Wisconsin by Michael D. Preston, Petitioner.

OPINIONS BELOW

As indicated in the Petition for a Writ the judgment of the Wisconsin Supreme Court is officially reported in 38 Wis. (2) 582 and unofficially in 157 N. W. (2) 615.

However, we call attention to the fact that the above judgment was modified on June 28, 1968 on Petitioner's motion for rehearing. The judgment as modified is reported in 159 N. W. (2) 684, but at this time is not in the official Wisconsin Reports, although it is set forth at pp. 17-21 of the Petition herein.

JURISDICTION

The Respondent raises no question at to the jurisdiction of this court to consider a Petition for a Writ of Certiorari by a disbarred attorney alleging violations of his rights under Article XIV, Sec. I, United States Constitution, but as is amply shown by the judgment of disbarment as amended on Petitioner's motion for rehearing no constitutional rights of the Petitioner were violated.

QUESTION PRESENTED

Was the Petitioner denied due process and equal protection of the law in an original action for disbarment in the State Supreme Court where the court made it clear that its order for disbarment was based upon proof of the allegations by clear, satisfactory, and convincing evidence, even though the referee appointed by the court to conduct the disbarment hearing had indicated that his findings were based upon the preponderance of the evidence?

REASONS FOR DENYING THE WRIT

I.

DISBARMENT IS AN ORIGINAL PROCEEDING IN THE WISCONSIN SUPREME COURT AND WHILE A REFEREE APPOINTED TO CONDUCT THE HEARING MAY MAKE RECOMMENDATIONS THE ISSUE TO BE DECIDED BY THE COURT IS NOT WHETHER THE REFEREE'S FINDINGS ARE SUPPORTED BY THE PROPER QUANTUM OF EVIDENC

In the Wisconsin Supreme Court's order on motion for rehearing the court emphasized the fact that the Petitioner here was proceeding upon the misconception that the court reviews the findings of the referee and applies an evidentiary test to determine whether the referee's findings are supported by the proper quantum of evidence and stated that this is not the correct test. See p. 18, Petitioner's Brief and 159 N. W. (2) 684.

The court then went on to say at the same page:

"A disciplinary proceeding is brought as an original action in this court, and the function of the referee is that of a special master appointed to conduct a hearing under the jurisdiction of this court. While the recommendations of the referee are given consideration, we look to the record and transcript to determine whether the facts apparent therein warrant some form of discipline. To evidence revealed in the record, we apply what this court has referred to (*Madison v. Geier* (1965), 27 Wis. 2d 687, 135 N. W. 2d 761) as the middle burden of proof."

This, of course, is consistent with Sec. 256.28 (12) Wis. Stats., which provides in part with reference to the referee's duties:

> "Upon the filing of the defendant's answer the supreme court shall appoint a referee to hear the cause and to report *his* findings to the court, together with *his* recommendations as to the judgment to be made." (Emphasis added)

The referee is not the court but a mere arm or agency of the court appointed by it to assist the court with whom the ultimate responsibility over the practice of law is vested.

> *State ex rel. Reynolds v. Dinger* (1961) 14 Wis. (2) 193, 109 N. W. (2) 685
>
> *State ex rel. State Bar v. Keller* (1961) 16 Wis. (2) 377, 114 N. W. (2) 796 (1963) 21 Wis. (2) 100, 123 N. W. (2) 905

Indeed the supreme court may not abdicate its responsibility with respect to regulation of the practice of law or delegate it to others. As was said in the case of *In re Cannon* (1932) 206 Wis. 374, 379, 240 N. W. 441, a case which involved the validity of a legislative attempt to restore the license of a disbarred attorney:

> ". . . We easily subject ourselves to the criticism of usurping power where by our decision the power is committed to the judicial rather than the legislative department of government. However, we may as easily subject ourselves to the criticism of timidity were we to betray a disposition to avoid responsibility. The usurpation of power is not more culpable than the abdication of responsibility."

Thus we are concerned here not with the findings of the referee or his recommendations all of which are advisory only. Rather we are concerned with the findings and order of the supreme court itself. It is not sitting as an appellate court to pass upon alleged errors of the referee. Instead it is sitting as a court of original jurisdiction, and it may or may not follow the findings and recommendation of the referee it has appointed to hear the matter. See for example *State v. Maddock* (1940) 234 Wis. 441, 291 N. W. 347, where it chose not to do so, saying:

> ". . . We have so many misgivings concerning the truthfulness and credibility of the complainant, upon whose testimony this proceeding is principally based, that we cannot approve of the recommendations of the referee."

II.

STATEMENT OF WISCONSIN SUPREME COURT THAT ITS CONCLUSIONS ARE BASED UPON PROOF OF THE ALLEGATIONS BY CLEAR, SATISFACTORY AND CONVINCING EVIDENCE MUST STAND AS A VERITY HERE

While as previously indicated the Wisconsin Supreme Court made it clear that although it gives consideration to the recommendations of the referee it nevertheless looks to the record and transcript to determine whether the facts apparent therein warrant some form of discipline. The court then stated in unequivocal language the evidentiary test it applied in these words at p. 19 of the Petition herein:

> "While the language used by the referee in the instant case indicated that he relied upon a preponderance of the evidence in making his findings, each of his find-

> ings was scrutinized by this court on the basis of the evidence of record, and the conclusions of this court are based upon proof of the allegations by clear, satisfactory, and convincing evidence. Any statement appearing in the body of the opinion giving the impression that a lesser burden of proof was required by this court in making its determination is erroneous and is hereby modified."

This statement of the Wisconsin Supreme Court in interpreting its own order in binding upon the court here. As was said by this court is *Lathrop v. Donahue* (1961) 367 U. S. 820, 828, in affirming 10 Wis. (2) 230, 102 N. W. (2) 404, relating to the validity of the integrated State Bar established by supreme court order:

> ". . . The Supreme Court of Wisconsin so interpreted its order and its interpretation is of course binding on us."

Likewise the interpretation given to its disbarment order here to the effect that its conclusions were those which it considered to be based upon proof of the allegations by clear, satisfactory, and convincing evidence must stand as a verity here.

III.

PETITIONER'S ARGUMENT THAT HE WAS DEPRIVED OF DUE PROCESS AND EQUAL PROTECTION BY REASON OF AN ALLEGED FINE LEVIED AGAINST HIM IS WHOLLY WITHOUT MERIT

While not mentioned in that part of the Petition relating to "Questions Presented" the Petitioner argues on p. 7 of the Petition that a fine was increased on his motion for rehearing.

In the first place this is not the fact. In the court's initial opinion it was stated: (p. 16 of Petition)

> "... ..that the defendant pay one-half the costs and expenses of this proceeding, which shall include fees and disbursements of the referee, attorney for the plaintiff, court reporter and printing, but not to exceed a maximum of $5000." (38 Wis. (2) 582, 589)

On motion for rehearing the court stated at p. 21 of the Petition, 159 N. W. (2) 684, 686:

> "... . Inasmuch as this court previously determined that a proper assessment of the costs against the defendant would be the sum of $5000, and the costs exclusive of attorney's fees are substantially in excess of that figure, we reaffirm that portion of the mandate assessing costs in the sum of $5000."

The court did omit from its second order the taxation of attorney's fees because not authorized by statute. However, nothing whatsoever was said about a fine in either the original opinion or in the opinion on rehearing, although a fine could have been assessed against the Petitioner under Sec. 256.28 (14) Wis. Stats. relating to dis-

ciplinary proceedings and which reads so far as material here:

> ". . . If the judgment is against the defendant, all or part of the costs may, in the discretion of the court, be charged to him, in which case they shall, together with any fine so adjudged, be collected by the district attorney of the county where the defendant resides, and by him paid into the state treasury."

Thus the Petitioner clearly misstates the facts when he argues on p. 7 of the Petition that the fine was increased on rehearing.

Since there simply was no fine any argument that the fine was increased cannot possibly raise a constitutional question.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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